SUPREME COURT, U. S.

MAY 3 1969

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 1356

HARRY SUGARMAN, *Petitioner,*

vs.

JACK B. FORBRAGD, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

GEORGE C. MARTINEZ,
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San Francisco, California 94102,
Attorney for Petitioner.

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San Francisco, California 94102,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for Ninth Circuit, entered in the above-entitled case on December 31, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (IR. 98-124) is reported in 267 F. Supp. 817. The opinion of the Court of Appeals, printed in Appendix B hereto, p. iv, is reported in 405 Fed. 2d 1189.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1968, IR. 148, App. B, p. viii. Rehearing was denied on February 11, 1969. IR. 149. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether governmental adjudications on the admissibility of imports within 21 U.S.C. 381(a) are subject to the provisions of the Administrative Procedure Act (5 U.S.C. §§ 551-558, 701-706).

STATUTE INVOLVED

The statutory provisions involved are Section 801 (a) of the Food, Drug, and Cosmetic Act, 52 Stat. 1058, 21 U.S.C. 381(a) and Section 701(a)(2) of the Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. 701(a)(2). They are printed in Appendix A, pp. i-iii.

STATEMENT

The fundamental action of this case was the filing by the appellant of a petition for mandatory injunction to compel Food and Drug Officers to allow the import of reconditioned coffee beans. The petition asked the court to make its decision on the record established at an administrative hearing held under

the authority of Section 801(a) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 381(a), in accordance with Section 7 of the Administrative Procedure Act, 5 U.S.C. 556(e).

The following statement summarizes the events and actions which transpired prior to and during the course of this case.

The coffee beans in question had been in transit from Colombia to Japan in March, 1966, when a fire occurred aboard ship. The coffee beans had been watered down with fresh and salt water and unloaded at the distress port of Los Angeles, California. Purchased by the appellant, the beans had been transported to Turlock, California, and then cleaned, dried and resacked under the supervision of the U.S. Customs.

On July 20, 1966, the petitioner had filed for consumption entry at the Bureau of Customs, San Francisco, offering for import 3,394 sacks of reconditioned coffee beans. On July 21, 1966, Food and Drug Officer, Fred E. Norman had responded with a "Notice of Detention and Hearing" (App. C-1, App. p. ix) on the contention that the reconditioned coffee beans were adulterated within the meaning of 21 U.S.C. 342 (a)(3).

Commencing on August 18, 1966, the petitioner had attempted to secure from the Food and Drug Administration (FDA) the scientific basis for the finding of adulteration (App. C-2, App. pp. xi-xii). The requested information was not provided (App. C-3, App. pp. xiii-xiv and C-4, App. pp. xv-xvi).

On January 6, 1967, a hearing had been held in San Francisco, California before Hearing Officer Fred E. Norman at which the appellant had appeared and introduced evidence. The FDA had refused to offer any evidence (App. C-5, App. pp. xvii-xviii). The hearing had been completed and the matter submitted to the Washington D.C. office for decision (Pet. Exhs. I-1 and J).

On February 1, 1967, Food and Drug Officer Jack B. Forbragd had approved only part of the petitioner's application, allowing said coffee beans to enter the United States to be used in the production of soluble coffee but not in the production of blended coffee (Pet. Exh. L). The appellant had asked reconsideration on the matter of using the said coffee beans in the production of blended coffee, but on March 28, Mr. Forbragd had notified appellant's attorney that such reconsideration was denied (Pet. Exh. M-O and Def. Exh. 1G).

Subsequently, the petition for Writ of Mandatory Injunction to compel the Food and Drug Officers to allow the reconditioned coffee beans to be used in the production of blended coffee in the United States was filed on March 31, 1967 (IR. 1-10). The petition was based on the argument that the FDA had not established a record supporting its negative decision and therefore had acted arbitrarily.

On April 19, the government filed a motion for dismissal of the petition for summary judgment (IR. 23-88), and on April 20, 1967, petitioner filed a cross-motion for summary judgment (IR. 14-22).

On May 2, the District Court heard the petition and motions (Reporter's Transcript (IIR.)), and on May 16, the District Court Order was entered dismissing the petition and denying petitioner's cross-motion and granting the government's motion for summary judgment (IR. 125). The District Court based its action on its ruling that the Administrative Procedure Act, requiring the establishment of a record and allowing judicial review thereof, does not apply to Section 801(a) of the Federal Food, Drug and Cosmetic Act [21 U.S.C. § 381(a)]. The petitioner appealed and on December 31, 1968, the Ninth Circuit Court of Appeals affirmed the order of the District Court (IR. 148). On February 11, 1969, the Ninth Circuit denied a petition for rehearing (IR. 149).

Although the appellant has subsequently sold and re-exported the coffee beans in question, the lower court's decision in this matter, if allowed to stand, will have far-reaching effects. The decision can be used as a basis for denying the procedural safeguards of the Administrative Procedure Act to any citizen involved in importing goods under the jurisdiction of the Federal Food, Drug and Cosmetic Act.

REASONS FOR GRANTING THE WRIT

1. The District Court's decision was not made in the light of an important and germane Supreme Court decision subsequently handed down. Its decision conflicts with the judicial philosophy expressed

by the highest Court in *Abbott Laboratories, et al. v. John W. Gardner* (1967) 387 U.S. 136, 143 concerning the relationship of the Administrative Procedure Act to the Food, Drug and Cosmetic Act:

> ". . . survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. (Citations)
>
> "Early cases in which this type of judicial review was entertained have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. 701(a). The Administrative Procedure Act provides specifically not only for review of 'Agency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. (Citations) Again in *Rusk v. Cort,* supra, at 370-380, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See

also Jaffe, Judicial Control of Administrative Action 330-359 (1965)."

2. The appellate court's decision conflicts with a judicial analysis of the same subject expressed in an earlier decision of the Ninth Circuit Court in *Willapoint Oysters, Inc. v. Ewing, et al.* (1949), 174 F.2d 676, 686, cert. den. 338 U.S. 890:

> "When it enacted the Administrative Procedure Act in 1946, with its review proceedings (5 U.S.C.A. § 1009) Congress did not see fit to amend the provisions of the Food and Drug Act (21 U.S.C.A. § 371) relating to the scope of review proceedings under the latter Act, and for this reason Circuit courts face the task of harmonizing the review provisions of both pieces of legislation. The review provision of both Acts are in pari materia; both relate to the same matter or subject, and it is our view that they dovetail and should be considered together and given effect . . ."

The appellate court in *Willapoint* held that the Administrative Procedure Act applied to the Food, Drug and Cosmetic Act of 1938 in regard to rulemaking (food standards). The present appellant argues the logic of extending this application to the making of import determinations.

3. It can be shown that the decision of the court below is in conflict with legal precedent and legislative intent regarding the availability of judicial review under Section 801(a) of the Food, Drug and Cosmetic Act [21 U.S.C. 381(a)] governing import adjudications.

The District Court in the instant case noted the two reported cases involving Section 801(a), *Ambruster v. Mellon* (D.C. Cir. 1930) 41 F.2d 430 and *Bowman v. Retzlaff* (D. Md. 1946) 65 F. Supp. 265, where the federal courts did, in fact, review import determinations made by the Food and Drug Administration.

The District Court chose to discount the value of this legal precedent because both cases antedated the passage of the Administrative Procedure Act (1946) and the decision of *Larson v. Domestic and Foreign Commerce Corp.* (1949) 337 U.S. 682 (IR. 119). The petitioner continues to challenge the Court's ruling that the Administrative Procedure Act excludes agency actions under Section 801 of the Food, Drug and Cosmetic Act. Regarding the application of the *Larson* case by the District Court (IR. 116), the petitioner argues that the present case fits into one of the two categories therein cited where restraint may be obtained against the government to wit, "where the officer's action is outside the statutory limitation of his powers." The FDA officials in failing to follow the procedures laid down by the Administrative Procedure Act were so acting.

The appellant maintains that the chronology of the *Ambruster* and *Bowman* cases strengthens rather than weakens the argument that judicial review is available. *Ambruster* occurred in the days of the Food and Drug Act of 1906. Congress, aware that review of an import determination had been undertaken under the old act, could well have added a

clause to the 1938 Act excluding such possibility had it so desired. But instead of showing "clear and convincing evidence" of the intent to restrict access to judicial review (*Abbott Laboratories*, op. cit.), Congress incorporated the old import section into the new law in a form that was in every respect the same, except for very slight changes in some language [Dunn, Federal Food, Drug and Cosmetic Act: A Statement of Its Legislative Record 1102 (1938)]. Thus a District Court undertook to review the *Bowman* case on the validity of an import adjudication after the passage of the 1938 Act, whose basic import section (except for minor additions) has not been changed by Congress to date. The enactment of the Administrative Procedure Act subsequent to *Bowman* specified the mechanics by which the already established right of judicial review should be implemented.

4. The decision of the court below has and will cause confusion between the instant case and the *Bowman* case in the District Courts of other Circuits. In the recent coffee import-export action, *Carl Borchesinus Co. Inc. v. John W. Gardner, et al.* (E.D. La., 1968) 282 F. Supp. 396, involving reconditioning of damaged lots of coffee beans, the District Court held that the government did not have the discretion under Section 801 (b) [21 U.S.C. 371] to withhold the release for import of the sound coffee on the condition that the rejected coffee be destroyed rather than be re-exported. The District Court reviewed judicial relief and said (supra, 400):

> "The Court agrees that generally speaking judicial relief is not appropriate to relieve a party

> from administrative action if the administrative agency has exercised discretionary authority granted to it under a statute. (Citations) . . . *Sugarman v. Forbragd,* 267 F. Supp. 817 (N.D. Cal., 1967).
>
> . . . On the other hand it is well settled that judicial relief is appropriate to relieve aggrieved persons from administrative action beyond the statutory grants of authority . . . (Citations) *Bowman v. Retzlaff,* 65 F. Supp. 265 (D.C. Md., 1946)."

These two statements leave the courts with the obvious problem of how it can reasonably be determined if administrative action exceeds statutory grants of authority unless there is a record established which can be judicially examined. *Borchesinus* points to the fact that the whole matter of judicial relief in import determinations is now in dispute and must remain so until settled by the United States Supreme Court.

5. Clearly, the question presented is of importance to the entire import industry dealing with foods, drugs, and cosmetics. The decision of the court below takes away procedural safeguards and judicial relief in the area of import adjudications, while other provisions of the Food, Drug and Cosmetic Act are subject to the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. If the writ of certiorari is not granted, then it is requested that this action be dismissed because of mootness and that the judgment below be vacated.

Dated, San Francisco, California,
April 30, 1969.

Respectfully submitted,
GEORGE C. MARTINEZ,
Attorney for Petitioner.

GEORGE A. MCKRAY,
Of Counsel.

(Appendices Follow)

Appendix A

STATUTORY PROVISIONS

Administrative Procedure Act (Chapter 7—Judicial Review)

Section 701 [5 U.S.C. 701] (a) This chapter applies according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) *agency action is committed to agency discretion by law.* (Emphasis added)

Federal Food, Drug, and Cosmetic Act (Chapter 7—Imports and Exports)

Section 801 [21 U.S.C. 381] (a) The Secretary of the Treasury shall deliver to the Secretary of Health, Education, and Welfare, upon his request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee, who may appear before the Secretary of Health, Education, and Welfare and have the right to introduce testimony. The Secretary of Health, Education, and Welfare shall furnish to the Secretary of the Treasury, a list of establishments registered pursuant to subsection (i) of section 510 and shall request that if any drugs manufactured, prepared, propagated, compounded, or processed in an establishment not so registered are imported or offered for import into the United States, samples of such drugs be delivered to the Secretary of Health, Education, and Welfare, with

notice of such delivery to the owner or consignee, who may appear before the Secretary of Health, Education, and Welfare and have the right to introduce testimony. *If it appears* from the examination of such samples or otherwise that (1) such article has been manufactured, processed, or packed under insanitary conditions, or (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or (3) such article is adulterated, misbranded, or in violation of section 505, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations. This paragraph shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under section 2 of the Act of May 26, 1922, as amended (U.S.C., 1946 edition, title 21, sec. 173).

(b) Pending decision as to the admission of an article being imported or offered for import, the Secretary of the Treasury may authorize delivery of such article to the owner or consignee upon the execution by him of a good and sufficient bond providing for the payment of such liquidated damages in the event of default as may be required pursuant to regulations of the Secretary of the Treasury. If it appears to the Secretary of Health, Education, and Welfare that an article included within the provisions of clause

(3) of subsection (a) of this section can, by relabeling or other action, be brought into compliance with the Act or rendered other than a food, drug, device, or cosmetic, final determination as to admission of such article may be deferred and, upon filing of timely written application by the owner or consignee and the execution by him of a bond as provided in the preceding provisions of this subsection, the Secretary may, in accordance with regulations, authorize the applicant to perform such relabeling or other action specified in such authorization (including destruction or export of rejected articles or portions thereof, as may be specified in the Secretary's authorization). All such relabeling or other action pursuant to such authorization shall in accordance with regulations be under the supervision of an officer or employee of the Department of Health, Education, and Welfare designated by the Secretary, or an officer or employee of the Department of the Treasury designated by the Secretary of the Treasury. (Emphasis added)

Appendix B

United States Court of Appeals
For the Ninth Circuit

Harry Sugarman,	Appellant,	No. 22,102
vs.		
Jack B. Forbragd, et al.,	Appellees.	

[December 31, 1968]

On Appeal from the United States District Court for the Northern District of California.

Before: JOHNSEN,* MERRILL and CARTER, Circuit Judges.

MERRILL, Circuit Judge:

Appellant seeks by suit for injunction to review an order of the Food and Drug Administration excluding from import as adulterated certain damaged coffee beans.

In entering its order the Food and Drug Administration was acting for the Secretary of Health, Education and Welfare pursuant to the terms of the

*Hon. Harvey M. Johnsen, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Food, Drug and Cosmetics Act, 21 U.S.C. §381(a).[1] The question presented is whether (absent arbitrary or capricious action which clearly is lacking here) such an order excluding material from import under §381(a) is subject to judicial review. The District Court held that it was not.[2] We agree.

Appellant contends that the Administrative Procedure Act, 5 U.S.C. §§551-558, 701-706, applies to require agency notice and hearing and provide judicial review. By the terms of that Act, §701(a) (2), it is not to apply where "agency action is committed to agency discretion by law."

In our judgment that is the situation here; by 21 U.S.C. §381(a) exclusion from import as there pro-

---

[1]21 U.S.C. §381(a) reads in pertinent part:

"The Secretary of the Treasury shall deliver to the Secretary of Health, Education, and Welfare, upon his request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee, who may appear before the Secretary of Health, Education, and Welfare and have the right to introduce testimony * * * If it appears from the examination of such samples or otherwise that (1) such article has been manufactured, processed, or packed under insanitary conditions, or (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or (3) such article is adulterated, misbranded or in violation of section 505, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional times as may be permitted pursuant to such regulations * * *."

[2]The District Court opinion, *Sugarman v. Forbragd*, 267 F.Supp. 817 (N.D.Cal. 1967), sets forth the facts in detail and deals with many additional issues none of which we reach.

vided is committed to the discretion of the Secretary of Health, Education and Welfare.

We note that the prescribed procedure suggests final discretionary authority in the Secretary. His judgment must be accepted and acted upon by the Secretary of the Treasury. Further, the language of the section "if it appears" suggests discretion to be tested by a standard of arbitrariness rather than error. These suggestions in our view are compellingly borne out by the fact that the Secretary's judgment may be founded solely upon his examination of the material in question.[3] While the superficiality of tests and inspections or an arbitrary refusal to accept their results may be appropriate subjects for judicial review, a dispute as to what an examination has established or disclosed is more appropriately left to agency expertise.

The material in question was determined to be adulterated under the statutory definition for the reason that it was found to be "unfit for food." 21 U.S.C. §342(a) (3). Appellant contends that to preclude arbitrary action the Secretary should promulgate regulations spelling out fitness for food.[4] The

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[3]While provision is made to supplement the Secretary's examination with a hearing, his decision need not be determined exclusively on the record of a formal hearing. The District Court held, and we agree, that to exclude imports, no formal hearing is required either by the Food, Drug and Cosmetic Act, 21 U.S.C. §381(a), by the Administrative Procedure Act, 5 U.S.C. §§551-558, or by the Constitution, congressional power over foreign commerce being absolute. 267 F.Supp. 817, 824-826.

[4]Procedures are provided for the promulgation of regulations at the instance of interested parties. 21 U.S.C. §371(e)(1)(B). No petition was here filed under this section.

administration here determined from its examination that due to its damage the material in question was wholly lacking in recognized food values. A determination of unfitness under these facts cannot, in our judgment, be regarded as arbitrary even in absence of more explicit definition by regulation.

Judgment affirmed.

United States Court of Appeals
For the Ninth Circuit

Harry Sugarman, Appellant, vs. Jack B. Forbragd, et al., Appellees.	No. 22,102

Appeal from the United States District Court for the Northern District of California.

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 31, 1968.

Appendix C-1 (Pet. Exh. A)

Date August 18, 1966

Sample No. SF 10-006

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
FOOD AND DRUG ADMINISTRATION
506 Federal Office Building
50 Fulton Street
San Francisco, California 94102

Hoyt, Shepston & Sciarroni
555 Commercial Street
San Francisco, California 94111

NOTICE OF DETENTION AND HEARING

RECEIVED
AUG 19 1966
HOYT, SHEPSTON & SCIARONI

SIR:

Examination of samples or other evidence indicates that the following described shipment may be in violation of the Federal Food, Drug, and Cosmetic Act as shown below. The merchandise should continue to be held intact pending final decision as to whether it shall be admitted or refused admission.

You have the opportunity to appear at the District office of the Food and Drug Administration at the above address to introduce testimony relative to the admissibility of the article or to file a statement in writing, within 15 days following the above date (Saturdays, Sundays, and holidays not included). The testimony which you may present may include evidence as to the manner in which the article can be brought into compliance with the Act or removed from its scope by rendering it not a food, drug, device, or cosmetic as defined by the Act.

FRED E. NORMAN
Food and Drug Officer

Sample No. SF 10-006

Label COFFEE

Consignee Sugarman Brothers, 124 Front Street, San Francisco, Calif.

Marks No marks

Shipper Manufacturer National Federation of Coffee Growers of Columbia, Buena Ventura, Columbia (Address)

3394 bags

$40,389 (Quantity and value)

Cons. invoice Buena Ventura Proforma (Place) (No.) (Date examined)

Sample taken 7/21/66 (Date)

7/22/66 (Date importer notified)

Steamer Gunhild Torm 7/20/66 (Date of entry)

Entry No. / I. T. No. 00301

SAN FRANCISCO (Port)

Action DETAINED 8/18/66 (Date)

Conclusions: DETAINED

Place of production Colombia

ADULTERATED within the meaning of Sec. 402 (a)(3) The article is unfit for food, since beverage made from it after roasting is nearly devoid of flavor and color characteristics of normal coffee.

cc: Customs
Admin: 2
Consignee
Customs Insp. Huxtzler/Port of Stockton
File

F. D. 777—Rev. July 1966

GPO 892-141

A

Appendix C-2 (Pet. Exh. A-1)

CLAIMANT'S REQUEST FOR INFORMATION

August 25, 1966

Mr. H. Gates
Division of Case Development and Control
Bureau of Regulatory Compliance
Food and Drug Administration
Health, Education and Welfare Building
330 Independence, S.W.
Washington, D.C. 20204

Dear Mr. Gates:

I have been referred to your office by Mr. Fred E. Norman of the District Office in San Francisco, concerning my request to obtain a representative sample and analysis relating to the attached "Notice of Detention and Hearing".

I am an attorney and represent the consignee, Sugarman Brothers, 124 Front Street, San Francisco, California, and I request the following:

1. A representative sample of the article, if possible, and the identifying marks or numbers, if any, of the packages (bags) from which the samples analyzed were obtained;

2. Inspection reports;

3. A copy of all analyses on which this detention and hearing proceeding is based, including, but not limited to, scientific and technical studies and other memoranda, reports, summaries and opinions of a scientific or technical nature.

My client, Sugarman Brothers, does meet the requirement of 21 CFR4.1, governing disclosure of official records and information. Sugarman Brothers as the consignee has an interest in this matter and intends to use such records and information to evaluate objectively your conclusions within the meaning of Section 402(a)(3) of the FD & C Act.

Mr. Norman has kindly given an indefinite extension as to setting a date for an administrative hearing on this matter.

After reviewing your records concerning the product, we will be able to make an informed and, we trust, reasonable decision regarding our future course of action.

We thank you in advance for your cooperation.

Very truly yours,
George A. McKray
Attorney at Law

GAMcK:mm
cc: Mr. Fred E. Norman
Food and Drug Officer
Food and Drug Administration

Mr. Harry Sugarman
Sugarman Brothers

Mr. W. L. McClintock

Appendix C-3 (Pet. Exh. C)

GOVERNMENT REJECTS CLAIMANT'S REQUEST

Department of Health, Education and Welfare
Food and Drug Administration
Washington, D.C. 20204

September 26, 1966

Mr. George Alexander McKray
Attorney at Law
646 Van Ness Avenue
San Francisco, CA 94102

Dear Mr. McKray:

This replies to your letters of August 25, and September 9, 1966, concerning the imported green coffee detained by our San Francisco District under their number SF 10-066.

There is no provision under the Federal Food, Drug and Cosmetic Act for the collection, by the Food and Drug Administration, of reserve portions of samples of foods in import status beyond that amount required for our analysis. We are therefore unable to provide you with a portion of our sample of this product. However, you may wish to contact Customs authorities at San Francisco regarding the possibility of your collecting a sample directly from this lot of coffee.

We are also unable to comply with your broad request for copies of all of our analyses and related reports pertaining to this detention and hearing. However, we can advise you that our Bureau of Science exam-

ined a beverage made from this coffee after roasting and found it to be nearly devoid of the flavor and color characteristic of normal coffee. In view of this, we consider this coffee to be unfit for food within the meaning of section 402(a)(3) of the Act, a copy of which is attached. May we also direct your attention to Chapter VIII of the Act (page 75), on Imports and Exports.

Sincerely yours,

(signed) John R. Schnably

John R. Schnably
Assistant to the Director
Division of Case Supervision
Bureau of Regulatory Compliance

Enclosure
FD&C Act & Regs

Appendix C-4 (Pet. Exh. F)

GOVERNMENT GIVES LIMITED INFORMATION

Department of Health, Education and Welfare
Food and Drug Administration
Washington, D.C. 20204

October 12, 1966

Air Mail

Mr. George Alexander McKray
Attorney at Law
646 Van Ness Avenue
San Francisco, CA 94102

Dear Mr. McKray:

This replies to your letter of September 29, and teletype of October 6, 1966 to Commissioner Goddard regarding the detention by our San Francisco District office of a lot of imported green coffee (SF 10-066).

We undertook to explain in our letter of September 26 the basis on which the product was classed as unfit for food and therefore adulterated under section 402 (a)(3) of the Act. That finding was based on organoleptic examination using Federal Purchase Specifications which we believe are comparable to New York Coffee Exchange Standards. The analyst report shows that half of the sample was ground and brewed on an "as is" basis and the other half was roasted and ground before preparing a brewed beverage. The result in the first instance was a beverage that had a smoky odor and flavor with only a slight odor and

flavor of green coffee. The roasted article yielded a beverage nearly devoid of any coffee flavor or color which had a burned flavor. These are the actual findings which formed the basis for detention. We might take this opportunity to point out that this coffee is also subject to a charge of adulteration under section 402(b)(1) in that a valuable constituent has been in whole or in part abstracted and perhaps other charges as well. We hope this is the information you need to prepare for the administrative hearing in San Francisco.

We appreciate your support of our efforts to improve the Food and Drug Administration as an effective instrument for protecting the interests of the general public in matters involving foods and drugs.

Sincerely yours,

(signed) Alfred Barnard

Alfred Barnard, Acting Director
Bureau of Regulatory Compliance

Appendix C-5 (II R. 52-53)

GOVERNMENT GIVES NO EVIDENCE AT HEARING

The Hearing Officer: Would you state that again, please?

Mr. McKray: That the hearing procedure to be followed before an administrative agency is usually prescribed by the statute creating the agency. If the statute fails to prescribe the hearing procedure, then all that is required is a fair hearing?

The Hearing Officer: That is true.

Mr. McKray: Now, under Section 801 of the Act, your Regulation 21 of the Code of Federal Regulations 1.318, requires that the owner of the consignee be given notice of detention and the opportunity to introduce testimony, and we have introduced our testimony.

But the Act and the Regulation is silent on procedure. So I presume that the Federal Administrative Procedure Act governs this hearing. I don't know, but I was just——

The Hearing Officer: Frankly, I don't know either.

Mr. McKray: But the issue is that this hearing should apply with fundamental principles of fairplay, principles of fairplay with the facts involved in the case.

I would like to point out at this time that the Food and Drug Administration has made no presentation at this hearing, nor has the Food and Drug Adminis-

tration allowed the owner or the consignee to examine any record or document involved in said coffee.

The second thing I would like to point out is this: Are you going to make the decision in this matter?

The Hearing Officer: First, I would like to point out that we presented our position when we issued the Notice of Detention and Hearing, and this hearing is for the purpose of you presenting your position.

In answer to your second question, no, I probably will not make the decision. It will probably be made in Washington.

Mr. McKray: Washington, D.C. will make the decision?

The Hearing Officer: Yes.

Mr. McKray: Now, we are going to give you a transcript of this hearing, but how would you make a decision if this was oral without it being reported? One reason that we recorded this hearing is so that we do have a record.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1356

HARRY SUGARMAN, PETITIONER

v.

JACK B. FORBRAGD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM WITH RESPECT TO MOOTNESS

This proceeding involves a civil action brought by petitioner to require the Food and Drug Administration to permit certain damaged coffee beans to be imported into the United States and used as food in the production of blended coffee. As petitioner has advised this Court, following the decision of the court of appeals below, petitioner sold the coffee beans as a food and they were re-exported from the United States. Thus, the cause has now become moot.

The facts, which are set forth in detail in the opinion of the district court (267 F. Supp. 817), may be

briefly summarized. The coffee beans were being transported from Colombia to Japan when a fire broke out on the ship requiring it to enter a distress port at Long Beach, California. There it became necessary to flood the beans with water because of spontaneous heating and smoking.

Shortly thereafter, petitioner and three others purchased the damaged coffee beans as salvage for $600. Petitioner then submitted the beans for import. The Food and Drug Administration obtained a sample of the beans and determined, after laboratory analysis and tests, that the beans were "unfit for food, since beverage made from it after roasting is nearly devoid of flavor and color characteristics of normal coffee." Pursuant to 21 U.S.C. 381(a) (set forth at Pet. App. A), a hearing was held at which petitioner was given the opportunity to present any evidence relating to the importability of the beans. After extensive correspondence the F.D.A. adhered to its determination that the beans could not be imported for use in blended coffee.

Petitioner then commenced the present action in the United States District Court for the Northern District of California to compel the F.D.A. officers to permit importation of the beans for use in blended coffee. Petitioner contended that the Administrative Procedure Act required the F.D.A. to hold an adversary hearing to establish the basis for its decision rather than the informal hearing contemplated by 21 U.S.C. 381(a). The district court held that the Administrative Procedure Act did not apply, since the matter was intended by Congress to be "committed to agency dis-

cretion by law" under 5 U.S.C. 701. 267 F. Supp. 817. The court of appeals affirmed. 405 F.2d 1189.

Petitioner filed a timely petition for a writ of certiorari in this Court on May 5, 1969. At about the same time, petitioner submitted a "Memorandum . . . Advising on the Issue of Mootness" in which he stated that after the decision below, he "sold the coffee beans as a food and they were re-exported from the United States."

Although petitioner apparently does not concede that the case is moot, it is clear that his action in selling and re-exporting the coffee beans has rendered wholly academic the issue he seeks to present concerning the type of procedures to be followed by the F.D.A. in making an import determination under 21 U.S.C. 381 as to the beans here involved. See *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324. The petitioner seeks only an advisory opinion; there is now no case or controversy before the Court.

Relying on *United States* v. *Munsingwear*, 340 U.S. 36, petitioner requests that, if the cause is deemed moot, certiorari be granted and the case remanded with directions to vacate the judgment. We question the propriety of such a disposition in this case.

In *Munsingwear* and *A. L. Mechling Barge Lines, Inc.* v. *United States, supra*, this Court indicated that where a party is unable to pursue his right to have an adverse decision reviewed because of intervening mootness the reviewing court should vacate the judgment below. This was done in order to safeguard the interest which the parties in those cases had in avoid-

ing the effect of the doctrine of collateral estoppel. Here, however, the mootness was caused entirely by the voluntary action of petitioner, the party seeking vacation of the judgment. In addition, petitioner is unable to show any concrete likelihood that the instant judgment will be used against him in a pending or subsequent proceeding. Thus the principle sought to be implemented by the procedure of vacating the judgment below lacks a factual basis here.

We recognize that the courts of appeals have applied *Munsingwear* and *Mechling Barge Lines* in talismanic fashion so as customarily to vacate the judgment of the tribunal below in any case in which the controversy has become moot. And in *Cozart* v. *Wilson*, 352 U.S. 884, this Court employed the same procedure, without objection by the parties, in a case where no interest in avoiding the effects of collateral estoppel remained to be vindicated.

In our view, however, where no substantial interest in safeguarding the losing party's right not to have the decision below used against him as res judicata or collateral estoppel exists, the procedure of vacating the judgment below results in the unnecessary destruction of precedent. That disposition seems particularly inappropriate in this case because it was petitioner himself who caused the case to become moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied or dismissed.

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JUNE, 1969.

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United States

OCTOBER TERM, 1968

No. 1356

HARRY SUGARMAN,
Petitioner,

vs.

JACK B. FORBRAGD, et al.,
Respondents.

PETITIONER'S BRIEF IN REPLY TO MEMORANDUM WITH RESPECT TO MOOTNESS

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PETITIONER'S BRIEF IN REPLY TO MEMORANDUM WITH RESPECT TO MOOTNESS

An individual dealing with his government is supremely interested in the procedural safeguards instituted by Congress when it enacted the Administrative Procedure Act (APA). Agency determinations regarding imports, no less than determinations on any other matter, can have such important consequences for the citizen involved that he looks to the APA as his fundamental guarantee of just action.

Three years ago the petitioner and his associates purchased damaged coffee for a nominal amount and then spent over $26,000 (excluding legal fees) to re-

condition it to meet acceptable commercial standards. The substantive question, whether the reconditioned beans were fit for food, was never determined either at the administrative hearing [see Memo. Appendix A (II R. 52-53)] or by judicial review [see Memo. Appendix B (II R. 74)]. Instead the coffee was barred from import for use as blended coffee on the basis that the FDA had the power to do so in its exercise of absolute discretion. During the years of litigation, the petitioner was faced with the expense of storing the perishable commodity; economic pressure finally forced him to sell and re-export the beans. Thus it is true that whether the coffee beans were fit for food is no longer pertinent. However, the issue of the plaintiff's rights regarding procedures is not moot, rather the courts below have removed these rights.

As the matter presently stands, the presence of three words, "If it appears", in 21 U.S.C. 381 constitutes justification for denial of the safeguards of the APA. Thus a dangerous precedent has been set for taking away rights intended to provide fair administrative hearings and judicial review. The government in its reply brief contends that there is no "concrete likelihood that the instant judgment will be used against him in a pending or subsequent procedure". The facts are that the government has already cited this case in *Carl Borcheninus Co., Inc. v. John W. Gardner, et al.* (E.D. La., 1968) 282 F. Supp. 396, *400,* in support of the proposition that a coffee importer has no right of judicial review if the

administrative agency has exercised discretionary authority under 21 U.S.C. 381. The likelihood that the government will use this precedent in ways detrimental to the petitioner and his fellow importers can be readily inferred from the following exchange between the government attorney and the District Court in this case (II R. 72-74):

> "The Court: All right, gentlemen, why shouldn't I send this case back to the Food and Drug Administration?
>
> Mr. Ensign: Well, because, Your Honor, the Court doesn't have the power to conduct a judicial review.
>
> The Court: Why not?
>
> Mr. Ensign: Because this is a case where the agency action is committed to the agency discretion.
>
> The Court: It says, 'if it appears from the examination . . .' What does that mean?
>
> Mr. Ensign: It means that if in the opinion of the Food and Drug Administration, from the examination or otherwise, the article is not fit for food . . .
>
> The Court: How does he exercise that discretion, don't bother me, that stuff burned on the ship, appears to me that's no good, that's the end of it, I don't want to hear any more. I have made my ruling. I have exercised my discretion. You mean to tell me the Food and Drug can go that far, even under import theory?
>
> Mr. Ensign: Might act beyond the statutory authority, in which case no court would be deprived of the power to conduct a judicial review.
>
> The Court: How do I determine whether he acted beyond his statutory authority?

Mr. Ensign: Well, the complaining party has the right to——

The Court: He has, he's coming here and he says, you've held all the cards up to your chest. You haven't shown me a single card. Now, that's not the exercise of discretion that's contemplated here, when it says 'appears,' has to appear not only to—in a sense to—while the statute makes discretionary—administrative officer, and has to appear to him, but that appearance to him has to be a reasonable appearance, and somebody's got a right to examine to see whether it's a reasonable appearance.

Mr. Ensign: So long as he acts within his statutory authority, our position is that the Court has no power for judicial review, and so long, of course, as the statute is constitutional as it is."

Incidentally, we regret that the line of questioning did not return and require the government to answer the Court's inquiry, "How do I determine whether he acted beyond his statutory authority?" in light of the government's claim that it does not have to establish a reviewable record as to the basis of its actions.

Kenneth Culp Davis, Professor of Law at the University of Chicago, has made pertinent commentary on the present issue in his Administrative Law Treatise, 1965, Pocket Part Section 28.16, pages 27-28.

"Is it good government—is it sound law—that permits a single individual to determine issues of law, fact, and discretion affecting the property rights of finance companies, without hearings, without review, without disclosure of the rules that are used to guide discretion, and without

opening to public inspection the resulting case law?

> "A reviewing court, without at any point substituting judgment, could (a) determine the reasonableness of the rules developed by the administrator as a guide to discretion, (b) require that those rules be open to public inspection, (c) ascertain whether the particular exercise of discretion arbitrarily departs from the administrative case law, (d) require that the administrative case law be open to public inspection in compliance with § 3(b) of the Administrative Procedure Act, (e) require findings of fact and a statement of reasons, (f) determine whether the findings are supported by substantial evidence, (g) determine whether the stated reasons are based upon considerations which are reasonable and legal."

The plaintiff most heartily recommends this view of Professor Davis to the Court in asking that the substantive issue of the fitness of the coffee beans, now moot, be dismissed, and the judgment undermining the effectiveness of the APA be either reviewed or vacated as in *Mechling Barge Lines v. U.S.*, 368 U.S. 324, and *U.S. v. Munsingwear,* 340 U.S. 36. The decision as it stands threatens to remove even the judicial relief afforded in import determinations antedating the passage of the APA [*Ambruster v. Mellon* (D.C. Cir. 1930) 41 F. 2d 430, and *Bowman v. Retzlaff* (D. Md. 1946) 65 F. Supp. 265].

CONCLUSION

In conclusion, the plaintiff's primary petition is for a writ of certiorari. If, however, the writ is not granted and this action is dismissed because of mootness, it is respectfully requested that the judgment below be vacated.

Dated, San Francisco, California,
June 11, 1969.

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